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Konradt Prosch v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NO B-05(M)-165-03 OF 2018
NOR BEE ARIFFIN, LEE SWEE SENG AND NORDIN HASSAN JJCA
22 DECEMBER 2020

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 39B(1)(a) of Dangerous Drugs Act 1952 for trafficking in dangerous drugs — Appellant convicted and sentenced to death — Whether SP5 was credible — Whether investigation was incomplete and flawed — Whether there were discrepancies in evidence of chemist — Whether trial judge failed to appreciate defence's case

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The appellant was appealing against the decision of the High Court in convicting the appellant for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and sentencing him to death pursuant to s 39B(2) of the same Act. On 25 October 2014, at about 11am, Lance Corporal Vyarra Sugara bin Kassim ('SP5') who was on duty at the baggage claim area at level three of the Main Terminal Building of the Kuala Lumpur International Airport noticed the appellant pulling a green trolley bag and acting suspiciously. SP5 instructed the appellant to bring his bag to the office of the Narcotic Division for further examination. Among the items found in the bag was a plastic bag contained a box which was wrapped with present paper and inside the box, SP5 found two aluminium foils. Further examination revealed that the aluminium foils contained crystalline substances suspected to be dangerous drugs. The crystalline substances were sent to the chemist ('SP2') for analysis and she confirmed that the substances contained 1,382.6g of methamphetamine. The trial judge found that a prima facie case had been established for the offence of trafficking in dangerous drugs against the appellant. The appellant was called to enter his defence. However, the trial judge found that the defence had failed to rebut the presumption under s 37(d) of the DDA and further failed to raise a reasonable doubt on the prosecution's case. Therefore, the trial judge found that the prosecution had succeeded in proving its case beyond reasonable doubt. The appellant was convicted for the offence and sentenced to death pursuant to s 39B(2) of the DDA. Hence, this appeal. The issues for consideration were: (a) whether SP5 was credible; (b) whether the investigation was incomplete and flawed; (c) whether there were discrepancies in the evidence of the chemist; and (d) whether the trial judge failed to appreciate the defence's case.

Held, dismissing the appeal:

- (1) The appellant had the control and custody of the bag where the drugs were found. This triggered the invocation of presumption of possession under s 37(d) of the DDA which was correctly applied by the trial judge. The appellant was apprehended in the act of carrying from South Africa into Malaysia a large amount of dangerous drugs, the bag was registered in the appellant's name and the drugs were placed in a box wrapped with present paper. Therefore, the appellant was a trafficker within the meaning of s 2 of the DDA. The appellant was carrying or transporting the drugs for the purpose of trafficking which need plausible explanation from the appellant which the appellant had failed to do. As such, the trial judge was correct in his finding that the element of trafficking under s 2 of the DDA had been proven by the prosecution (see paras 11, 19 & 22).

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- (2) The contention that SP5 was suspended for disciplinary reason was not supported by evidence and even if it was true that SP5 was suspended on disciplinary ground, it did not mean that his evidence could not be accepted by the court. There was no reason to interfere with the finding of the trial judge on the credibility of SP5. As such, the appellant's contention on this issue was without merit (see paras 25 & 27–28).

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- (3) The evidence against the appellant was overwhelming and there was no gap in the prosecution's case. The prosecution had established all the elements to prove the charge of trafficking in dangerous drugs against the appellant. Therefore, the failure to investigate the contents of the appellant's handphone was not fatal to the prosecution's case. Further, the applicant did not furnish any detailed particulars of the person named Mike to enable the police to commence an investigation on Mike. Next, the DNA evidence was only corroborative evidence and its absence did not affect the prosecution's case if there were other evidence to prove the charge against the accused. Hence, the complaint about the incomplete and flawed investigation was untenable (see paras 30–32).

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- (4) SP2 was the one who conducted the affirmative test using GCMS. There was no material contradiction in the evidence of SP2 and her evidence, including the affirmative test using GCMS was correctly accepted by the trial judge. SP2's evidence was not inherently incredible as she was merely conducting the tests to determine whether the substances were dangerous drugs in accordance with the established methods and there was no other expert was called to contradict her result of the analysis. Thus, her evidence on the analysis of the drugs was correctly accepted (see paras 36–38 & 40).

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- (5) The trial judge had analysed the defence's case sufficiently and found that the appellant had failed to rebut the relevant presumption and had also failed to raise a reasonable doubt on the prosecution's case. Next, the doctrine of 'wilful blindness' was applicable against the appellant. His failure to enquire further with regard to the contents of the box raised a

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- A reasonable inference that he knew the box contained dangerous drugs and he was guilty of wilful blindness. The appellant came to Malaysia not for any business but to traffic the impugned drugs. In the circumstances, the trial judge was correct in rejecting the defence's version and concluded that the defence had failed to rebut the presumption under s 37(d) of the DDA and failed to raise a reasonable doubt on the prosecution's case (see paras 45–46 & 49–50).
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[Bahasa Malaysia summary]

- C Perayu merayu terhadap keputusan Mahkamah Tinggi yang mensabitkan perayu atas kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan menjatuhkan hukuman mati kepadanya menurut s 39B(2) Akta yang sama. Pada 25 Oktober 2014, sekitar pukul 11 pagi, Lans Koperel Vyarra Sugara bin Kassim ('SP5') yang bertugas di kawasan tuntutan bagasi di tingkat tiga Bangunan Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur menyedari perayu menarik troli hijau beg dan bertindak mencurigakan. SP5 mengarahkan perayu membawa begnya ke pejabat Bahagian Narkotik untuk pemeriksaan lanjut. Antara barang yang terdapat di dalam beg itu ialah beg plastik berisi kotak yang dibalut dengan kertas hadiah dan di dalam kotak itu, SP5 menjumpai dua *aluminium foil*.
- D Pemeriksaan lebih lanjut menunjukkan bahawa *aluminium foil* mengandungi bahan kristal yang disyaki sebagai dadah berbahaya. Bahan kristal itu dihantar ke ahli kimia ('SP2') untuk dianalisis dan beliau mengesahkan bahawa bahan tersebut mengandungi 1,382.6g methamphetamine. Hakim bicara mendapati bahawa kes prima facie telah dibuktikan atas kesalahan mengedar dadah berbahaya terhadap perayu. Perayu dipanggil untuk membela diri. Walau bagaimanapun, hakim bicara mendapati bahawa pihak pembelaan gagal menolak anggapan di bawah s 37(d) ADB dan seterusnya gagal menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Oleh itu, hakim bicara mendapati bahawa pihak pendakwaan berjaya membuktikan kesnya tanpa keraguan yang munasabah. Perayu telah disabitkan atas kesalahan tersebut dan dijatuhkan hukuman mati menurut s 39B(2) ADB. Oleh itu, rayuan ini.
- E Isu-isu untuk pertimbangan adalah: (a) sama ada SP5 adalah kredibel; (b) sama ada siasatan tidak lengkap dan tidak sempurna; (c) sama ada terdapat perbezaan dalam keterangan ahli kimia; dan (d) sama ada hakim bicara gagal menilai kes pembelaan.
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Diputuskan, menolak rayuan:

- I (1) Perayu mempunyai kawalan dan jagaan beg di mana dadah itu dijumpai. Ini mencetuskan pemakaian anggapan pemilikan di bawah s 37(d) ADB yang diterapkan dengan betul oleh hakim bicara. Perayu ditangkap dalam tindakan membawa dari Afrika Selatan ke Malaysia sejumlah besar dadah berbahaya, beg itu didaftarkan atas nama perayu dan dadah tersebut diletakkan di dalam kotak yang dibungkus dengan kertas

- hadiah. Oleh itu, perayu adalah pengedar dalam maksud s 2 ADB. Perayu membawa atau mengangkut dadah untuk tujuan mengedar yang memerlukan penjelasan yang masuk akal daripada perayu yang gagal dilakukan oleh perayu. Oleh itu, hakim bicara adalah betul dalam penemuannya bahawa unsur pengedaran di bawah s 2 ADB telah dibuktikan oleh pihak pendakwaan (lihat perenggan 11, 19 & 22). A
- (2) Pertikaian bahawa SP5 digantung kerana alasan disiplin tidak disokong oleh keterangan dan walaupun jika benar bahawa SP5 digantung atas alasan disiplin, itu tidak bermaksud bahawa keterangannya tidak dapat diterima oleh mahkamah. Tidak ada alasan untuk mengganggu penemuan hakim bicara mengenai kredibiliti SP5. Oleh yang demikian, pertikaian perayu mengenai isu ini adalah tanpa merit (lihat perenggan 25 & 27–28). B
- (3) Keterangan terhadap perayu adalah sangat banyak dan tidak ada jurang dalam kes pendakwaan. Pihak pendakwaan telah membuktikan semua elemen untuk membuktikan tuduhan mengedar dadah berbahaya terhadap perayu. Oleh itu, kegagalan menyiasat kandungan telefon bimbit perayu tidak memudaratkan kes pendakwaan. Selanjutnya, pemohon tidak memberikan butiran terperinci mengenai orang yang bernama Mike untuk membolehkan polis memulakan siasatan terhadap Mike. Seterusnya, bukti DNA hanya bukti yang menyokong dan ketiadaannya tidak mempengaruhi kes pendakwaan sekiranya terdapat bukti lain untuk membuktikan pertuduhan terhadap tertuduh. Oleh itu, aduan mengenai penyiasatan yang tidak lengkap dan cacat tidak dapat dipertahankan (lihat perenggan 30–32). C
- (4) SP2 adalah orang yang menjalankan ujian afirmatif menggunakan GCMS. Tidak ada percanggahan material dalam keterangan SP2 dan keterangannya, termasuk ujian afirmatif menggunakan GCMS diterima dengan betul oleh hakim bicara. Keterangan SP2 tidak semestinya tidak kredibel kerana beliau hanya menjalankan ujian untuk menentukan sama ada bahan tersebut adalah dadah berbahaya sesuai dengan kaedah yang ditetapkan dan tidak ada pakar lain yang dipanggil untuk membantah hasil analisisnya. Oleh itu, keterangannya mengenai analisis dadah diterima dengan betul (lihat perenggan 36–38 & 40). D
- (5) Hakim bicara telah menganalisis kes pembelaan dengan cukup dan mendapati bahawa perayu gagal membantah anggapan yang relevan dan juga gagal menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Seterusnya, doktrin ‘wilful blindness’ terpakai terhadap perayu. Kegagalannya untuk meneliti lebih lanjut mengenai isi kotak itu menimbulkan kesimpulan yang munasabah bahawa dia tahu kotak itu mengandungi dadah berbahaya dan dia bersalah dengan salah yang disengajakan. Perayu datang ke Malaysia bukan untuk sebarang perniagaan tetapi untuk mengedar dadah yang dipersoalkan. Dalam E
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- A keadaan itu, hakim bicara adalah betul dalam menolak versi pembelaan dan menyimpulkan bahawa pihak pembelaan gagal menolak anggapan di bawah s 37(d) ADB dan gagal menimbulkan keraguan yang munasabah terhadap kes pendakwaan (lihat perenggan 45–46 & 49–50).]

B **Cases referred to**

- Azhar bin Lazim v PP* [2012] 5 MLJ 1; [2012] LNS 262, CA (refd)
Bhojraj v Sitaram AIR 1936 PC 60, PC (refd)
Chew Boon Ee v Ramanathan Chettiar & Ors [1959] 1 MLJ 235, PC (refd)
 C *Francis Abichi Odike v PP* [2015] MLJU 816, CA (refd)
Johar bin Mustapha v PP [2009] 6 MLJ 593; [2009] 6 CLJ 193, FC (refd)
Mohamed Yatin bin Abu Bakar v PP [1950] 1 MLJ 57 (refd)
Muniandy & Ors v PP [1966] 1 MLJ 257, FC (refd)
Munusamy v Public Prosecutor [1987] 1 MLJ 492, SC (refd)
 D *Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] 1 MLJ 64, PC (refd)
PP v Abdul Manaf bin Muhammad Hassan [2006] 3 MLJ 193, FC (refd)
PP v Abuchi Ben James and another appeal [2015] MLJU 2186; [2015] 8 CLJ 1011, CA (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
 E *PP v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, FC (refd)
PP v Herlina Purnama Sari [2016] 1 LNS 1855; [2017] 1 MLRA 499, FC (refd)
PP v Lam San [1991] 3 MLJ 426, SC (refd)
 F *PP v Reza Mohd Shah bin Ahmad Shah* [2009] 2 MLJ 490; [2010] 1 CLJ 541, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a), (2), First Schedule

- G **Appeal from:** Criminal Trial No 45A-86–08 of 2015 (High Court, Shah Alam)

Suzanawati bt Ismail (Nor Azzahra bt Norhaznan with her) (Suzana Ismail & Partners) for the appellant.

- H *Nurul Farhana bt Khalid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Nordin Hassan JCA (delivering judgment of the court):

I INTRODUCTION

[1] The appellant, a South African national, is appealing against the decision of the Shah Alam High Court judge in convicting the appellant for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs

Act 1952 ('the DDA') and sentencing him to death pursuant to s 39B(2) of the same Act. The appeal is against the conviction and sentence.

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THE PROSECUTION'S CASE

[2] The case for the prosecution, established through its witnesses and accepted by the trial judge is relatively straight forward which is as follows. On 25 October 2014, at about 11am, Lance Corporal Vyarra Sugara bin Kassim (SP5) together with other police personnel from the Narcotic Division of the Kuala Lumpur International Airport ('KLIA') were on duty at the baggage claim area at level 3 of the Main Terminal Building. SP5 then noticed the appellant pulling a green trolley bag and acting suspiciously. SP5 then approached the appellant, introduced himself as a police officer and instructed the appellant to scan his bag at the scanning machine. At that time, SP5 observed that the appellant looked afraid. However, no suspicious object was detected by the scanning machine. Thereafter, SP5 instructed the appellant to bring his bag to the office of the Narcotic Division for further examination. At the office, examination on the appellant was conducted but nothing incriminating was found. Upon the instruction of SP5, the appellant opened his bag and among the items found in the bag was a plastic bag with the words 'MRP.COM' written on it. The plastic bag contained a box which was wrapped with present paper and inside the box, SP5 found two aluminium foils. Further examination revealed that the aluminium foils contained crystalline substances suspected to be dangerous drugs.

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[3] Next, the crystalline substances were sent to the Chemist, Suhana bt Ismail ('SP2') for analysis and she confirmed that the substances contained 1,382.6g of methamphetamine, a dangerous drug listed under the First Schedule to the DDA.

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[4] Further, a hair comb found in the same bag was also sent to the Chemistry Department for DNA testing and was found that it matches with the appellant's DNA.

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THE FINDINGS OF THE TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION'S CASE

[5] At the close of the prosecution's case the trial judge had made the following findings:

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- (a) that the evidence of the chemist was credible and accepted her evidence which proved that the crystalline substances contained methamphetamine, a dangerous drug listed under the First Schedule to the DDA;

- A (b) that the custody and control of the impugned drugs by the appellant had been established by the prosecution and as such the presumption of possession under s 37(d) of the DDA was applicable; and
- (c) that the prosecution had established the element of trafficking as defined under s 2 of the DDA.
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- [6] Consequently, the trial judge found that, on the maximum evaluation of the prosecution's case, a prima facie case had been established for the offence of trafficking in dangerous drugs against the appellant as per the charge. Hence, the appellant was called to enter his defence.
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THE DEFENCE

- [7] The appellant gave evidence on oath and in essence his defence was that he was an 'innocent carrier'. He had no knowledge of the drugs in the box as it was handed to him by a person called 'Frank' when they were in South Africa. Frank had asked him to deliver the box to his brother 'Mike' in Malaysia. He was told that the box contained chocolates. The appellant testified that he decided to come to Malaysia as he was promised a job by Frank and Mike. He was also told by Frank that Mike has three electronic wholesale shops in Malaysia. The appellant further testified that it is not proper or nice for him to open a present which was meant for someone else and that was the reason why he did not check the contents of the said box which was wrapped with the present paper.
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THE FINDING OF THE TRIAL JUDGE AT THE END OF THE DEFENCE'S CASE

- [8] Having considered the defence and the totality of evidence before the court, the trial judge found that the defence had failed to rebut the presumption under s 37(d) and further failed to raise a reasonable doubt on the prosecution's case. Therefore, the trial judge found that the prosecution had succeeded in proving its case beyond reasonable doubt. Hence, the appellant was convicted for the offence as per the charge and sentenced to death pursuant to s 39B(2) of the DDA.
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[9] In arriving at this decision, the trial judge had taken into account the following established facts:

- I (a) that the appellant was seen pulling the trolley bag alone;
- (b) that the tag on the bag bore the appellant's name;
- (c) that the appellant had ample time to check the contents of the box but had failed to do so;

- (d) that the ownership of the drugs is irrelevant as the offence of trafficking in the dangerous drugs had been proven against the appellant; and A
- (e) that the evidence of SP5 and SP8, the investigating officer were accepted as they had no reason to frame the appellant whom they had never met before the appellant was arrested. B

THE APPEAL

[10] The appellant's appeal was premised on the following grounds:

- (a) that the trial judge erred in relying on the evidence of SP5 as he was suspended from the police force at the time he testified in court in the present case. As such his credibility is questionable; C
- (b) that the trial judge erred in failing to take into account that the investigation in the present case was incomplete and flawed; D
- (c) that the trial judge had failed to consider the discrepancies in the evidence of the chemist with regard to the GCMS analysis on the drugs; and
- (d) that the trial judge had failed to appreciate the defence case. E

OUR DELIBERATION AND DECISION

[11] In the present case, the undisputed fact was that, the appellant was arrested whilst pulling a trolley bag that contained the impugned drugs. Clearly, the appellant had the control and custody of the said bag where the drugs were found. These primary facts of control and custody triggered the invocation of presumption of possession under s 37(d) of the DDA which was correctly applied by the trial judge. For ease of reference, s 37(d) states: F

any person who is found to have had in custody or control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug; (Emphasis added.) G

[12] The application of the presumption under s 37(d) and (da) had been lucidly explained by the Federal Court in the case of *Public Prosecutor v Abdul Manaf bin Muhammad Hassan* [2006] 3 MLJ 193 at p 203, in the following words: H

[17] It ought to be stated at the outset that the decision in Muhammad bin Hassan only prohibits the use of double presumptions under s 37(d) and 37(da) of the Act. It is therefore, open to the prosecution to rely on either of the presumptions. In other words, the prosecution may positively prove possession without relying on the presumption under s 37(d) of the Act and go on to rely on the presumption of trafficking under 37(da) of the Act to support a charge under s 39B of the Act. See I

- A *Tunde Apatira & ors v Public Prosecutor; Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314, a decision of Court of Appeal which was confirmed by this Court in Federal Court Criminal Appeal No 05–27 of 2004(K). *Conversely, the prosecution may rely on the presumption under s 37(d) to prove possession and seek to prove by affirmative evidence (independent of the presumption under s 37(da)) that the*
- B *accused was in fact trafficking in the dangerous drugs. (Emphasis added.)*

- [13] Knowledge as to the nature of the drug is also presumed under this s 37(d) upon having established the primary facts of control or custody. The Federal Court in the case of *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2009] 2 MLJ 490; [2010] 1 CLJ 541 had this to say on this issue:
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- [23] As to the meaning of ‘nature’ in s 37(d), I do not think it really matters what the extent of the meaning is, because the presumption is rebuttable. *The moment custody or control of the thing containing the dangerous drug is established, knowledge of the nature of the drug is presumed ... (Emphasis added.)*
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- [14] As to the issue of trafficking in the dangerous drugs, the trial judge had made his finding of fact that based on available evidence, the prosecution had proved the element of trafficking as defined under s 2 of the DDA which provides:
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- trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, *transporting, carrying*, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulation made under the Act ... (Emphasis added.)
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- [15] In *Ong Ah Chuan v Public Prosecutor, Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 and accepted with approval by the Federal Court in *Public Prosecutor v Abdul Manaf bin Muhamad Hassan*, it was decided that an act of carrying per se, without an overt act, is insufficient to constitute an offence of trafficking. The court explained as follows:
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- [20] However, *the mere act of carrying is not sufficient to constitute the offence of trafficking*. This is clearly explained by Lord Diplock in *Ong Ah Chuan v Public Prosecutor, Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, where at p 68 he observed:
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- To ‘traffic’ in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self administration of the drug; it involves doing or offering to do *an overt act* of one or of other of the kinds specified in paragraph (a) of the definition of ‘traffic’ and trafficking in s 2 ... (Emphasis added.)
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- [16] Lord Diplock in the same case, had categorised the overt act in the following manner:

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act of preparatory to or in furtherance of or for the purpose of trafficking as to permit the conviction of the possessor of the substantive offence. *To bring the provisions of sections 10 and 3(c) into operation some further steps or overt act by the accused is needed, directed to transferring possession of the drug to some other person, and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.* (Emphasis added.)

[17] In the present case, the impugned drugs were carried into Malaysia from South Africa in a box which was wrapped with present paper. The reasonable inference is that it was intended to show that there was nothing incriminating in the box. Further, the total amount of 1,382.6g of methamphetamine can reasonably be inferred to be delivered to another party and not for the appellant's own consumption. Therefore, there was an overt act that accompanied the act of carrying of the drugs in this case.

[18] Be that as it may, this principle of law on the requirement of an overt act has been diluted by the decision of the Federal Court in the case of *Public Prosecutor v Herlina Purnama Sari* [2016] 1 LNS 1855 where it was held that the requirement of an overt act in all cases in order to constitute trafficking is misconceived. Raus Sharif PCA (as he then was), delivering the judgment of the court had this to say:

[37] *The second error of the trial judge's finding that to constitute trafficking, the mens rea possession must be accompanied by some overt act by the respondent. It is unfortunate that the Court of Appeal had also committed similar error in agreeing with the finding of fact of the trial judge by holding 'without any evidence that would show an overt act of one or other of the kind specified in the definition of trafficking in s 2 of Act 234 or specifically of conveying, transporting, carrying, moving or promoting from one place to another in the sense of doing so to promote the distribution of the drug to another', the respondent could not be a trafficker but merely had passive possession of the impugned drugs.*

[38] *With respect, the proposition that there must be in all cases an overt act in order to constitute trafficking is misconceived. It would be contrary to the definition of trafficking as provided for under s 2 of the Act ...*

[39] *We are of the view that whether or not a person is a trafficker within the definition of s 2 of the Act is dependent of the facts and circumstances of a given case.* In this case, it is not in dispute that when the respondent was arrested she was carrying the luggage bag which amongst other things contained the impugned drugs. The respondent was apprehended in the act of carrying from one place to another a large

- A amount of dangerous drugs. It is in evidence that the respondent was unaccompanied by any person when she carried the luggage bag. The luggage bag was registered in the respondent's name when she checked in at the Air Asia check-in counter. The impugned drugs were found hidden in the two boxes. In fact, the drugs were neatly and securely concealed from view in both the boxes. We are of
- B the view that the manner in which the impugned drugs were concealed in the luggage bag showed that the respondent knew the existence of the drugs there, and evinced the intention of the careful planning by the respondent to conceal the impugned drugs to avoid and escape detection.
- C (*Public Prosecutor v Abdul Rahman Aktif* [2007] 1 MLRA 568 and *Teh Hock Leong v Public Prosecutor* [2008] 1 MLRA 548) (Emphasis added.)

- D [19] Likewise in the instant case, the appellant was apprehended in the act of carrying from South Africa into Malaysia a large amount of dangerous drugs, the bag was registered in the appellant's name and the drugs were placed in a box wrapped with present paper. Therefore, the appellant was a trafficker within the meaning of s 2 of the DDA.

- E [20] In addition, Lord Diplock in *Ong Ah Chuan's* case had introduced the common sense approach, where if an accused is caught in the act of conveying from one place to another, controlled drugs in a quantity much larger than is likely to be needed for his own consumption, the inference is that he was transporting them for the purpose of trafficking in them in the absence of any plausible explanation. This need to be rebutted by the accused by convincing
- F evidence.

- G [21] There is plethora of authorities that applied this common sense approach including the Federal Court case of *Johar bin Mustapha v Public Prosecutor* [2009] 6 MLJ 593; [2009] 6 CLJ 193 where Alauddin Mohd Sheriff PCA (as he then was) delivering the judgment of the court, said this:

- H [41] In our respectful view, the act of the appellant in carrying or transporting the large quantity of drugs ie, 19,152g of cannabis in the boot of his car amounted to an act of trafficking of the said drugs as defined under s 2 of the DDA 1952 (*see also Mohammad Yazri Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65).

- I [22] Coming back to the present case, the appellant was carrying 1,382.6g of methamphetamine, which was a large quantity of drugs and clearly not for his own consumption. Hence, the inference is that, the appellant was carrying or transporting the drugs for the purpose of trafficking which need plausible explanation from the appellant which the appellant had failed to do. As such, the trial judge was correct in his finding that the element of trafficking under s 2 of the DDA had been proven by the prosecution.

THE CREDIBILITY OF SP5

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[23] Counsel for the appellant had raised the issue of SP5's credibility premised on the ground that SP5 was suspended from work when he testified in court in the present case.

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[24] On this issue, firstly, no evidence was adduced as to the reason for SP5's suspension and interestingly, SP5 was not cross-examined at all on this issue. However, in the written and oral submission of counsel for the appellant, he assumed that SP5 was suspended for disciplinary action and as such submitted that SP5's evidence must be assessed in light of his credibility.

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[25] Here, we find, the contention that SP5 was suspended for disciplinary reason was not supported by evidence and even if it is true that SP5 was suspended on disciplinary ground, it does not mean that his evidence cannot be accepted by the court. In a Privy Council case of *Bhojraj v Sitaram* AIR 1936 PC 60 quoted in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 it was held that the credibility tests of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case. Further, the inherent probability or improbability of a fact in issue must be the prime consideration (see *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257 (FC)).

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[26] The trial judge in the present case had accepted the evidence of SP5, having the opportunity to hear his evidence in court and assessed his demeanour. In his grounds of judgment, the trial judge said this at para 43:

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43. Saya tidak dapat menolak keterangan saksi-saksi pendakwaan, terutama SP5 dan SP8, keterangan mereka adalah bebas sebagai saksi kejadian, tidak mungkin mereka berbohong atau bersekongkol untuk memastikan yang OKT dihukum, mereka tidak pernah kenal OKT sebelum ini.

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[27] In this regard, we have no reason to interfere with the finding of the trial judge on the credibility of SP5 and it is trite that the appellate court will not interfere with such finding unless the decision on the said finding is clearly wrong (see *Chew Boon Ee v Ramanathan Chettiar & Ors* [1959] 1 MLJ 235).

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[28] As such, the appellant's contention on this issue is without merit.

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INCOMPLETE AND FLAWED INVESTIGATION

[29] Next, it was the appellant's contention that the investigation in the present case was incomplete and flawed on the following grounds:

- A (a) failure to investigate the person name ‘Mike’;
(b) failure to investigate the message in the appellant’s handphone;
(c) failure to investigate the hotel mentioned in the message received in the appellant’s handphone; and
- B (d) failure to send the exhibits in the present case for DNA testing.

C [30] In relation to this issue, we find that the evidence against the appellant is overwhelming and there is no gap in the prosecution’s case. The prosecution had established all the elements to prove the charge of trafficking in dangerous drugs against the appellant. Therefore, the failure to investigate the contents of the appellant’s handphone is not fatal to the prosecution’s case. Further, the applicant did not furnish any detailed particulars of the person named Mike to enable the police to commence an investigation on Mike.

D [31] Next, the DNA evidence is only corroborative evidence and its absence does not affect the prosecution’s case if there are other evidence to prove the charge against the accused as in the present case. This court in *Francis Abichi Odiike v Public Prosecutor* [2015] MLJU 816 had decided as follows:

E Having said that, the DNA evidence or fingerprint lifting are only corroborative in nature when all other important ingredients of the offence, i.e. custody and control, actual possession and knowledge are proven. When the evidence are overwhelming, the DNA evidence or the contamination thereof becomes irrelevant.

F [32] Hence, the complaint about the incomplete and flawed investigation in the present case is untenable.

THE DISCREPANCIES IN THE EVIDENCE OF THE CHEMIST

G [33] Further, counsel for the appellant submitted that there was contradiction on the issue of the person who conducted the GCMS analysis on the drugs. It was contended that the chemist, SP2, in her witness statement (P8) and the chemist report (P11) stated that the GCMS analysis was conducted by her but in her cross-examination, she mentioned that the GCMS analysis machine was calibrated by a Science Officer, Nurul Dalilah. It was further contended that there was doubt as to the actual person who conducted the GCMS analysis which was the affirmation test that the substances were dangerous drugs. This was said to be fatal to the prosecution’s case. The decision of this court in *Public Prosecutor v Abuchi Ben James and another appeal* [2015] MLJU 2186; [2015] 8 CLJ 1011 was cited to support the appellant’s contention.

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[34] In this regard, it is pertinent to analyse the evidence of SP2 before the court in deciding the issue at hand. In SP2's written statement (P8), SP2 stated the she conducted the affirmative test using Gas Chromatography-Mass Spectrometer (GCMS) where she said this:

A

Selepas itu saya telah menghomogenkan bahan tersebut dan kemudian saya telah menjalankan ujian-ujian kimia berikut:

B

1) Ujian warna

...

2) *Ujian pengesahan menggunakan Gas Chromatography- Mass Spectrometer (GCMS)*

C

Tujuannya bagi mengesahkan jenis dadah yang terdapat dalam bahan tersebut. *Daripada ujian ini saya telah mengesahkan bahawa bahan tersebut mengandungi dadah jenis methamphetamine ...* (Emphasis added.)

[35] In cross-examination, SP2 testified that the GCMS machine was calibrated by the Science Officer, Nurul Dalilah who conducted the GCMS test. However, the data were interpreted by SP2. Further, in re- examination she explained that the Science Officer only assisted her in conducting the GCMS test. This is reflected in notes of proceedings as follows:

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S: Berkenaan dengan ujian GCMS dan library reading kamu perlu compare. Dalam analisa yang kamu jalankan ini adakah kamu sahkan kesemua reading dan reading GCMS dan analisa perbandingan yang kamu buat ini adalah betul dan sah?

E

J: *Ya, saya sahkan segala keputusan yang saya perolehi adalah sah dan boleh diterima pakai.*

S: Peguam ada tanya satu soalan spesifik di mana beliau nyatakan sekiranya hasil GCMS ini tidak padan dengan library reading maka ia bukanlah methamphetamine.

F

J: Ya, hasil keputusan saya adalah padan dan ia adalah dadah jenis methamphetamine.

S: Bagaimana pula dengan mesin tersebut adakah ia dalam keadaan optimum?

G

J: *Ya, saya memastikan peralatan GCMS adalah keadaan yang optimum supaya analisa boleh diteruskan.*

S: *Walaupun terdapat Penolong Pegawai Sains, Cik Dalilah, dia membantu kamu menjalankan ujian GCMS. Siapa yang mengawal dan membuat keputusan terakhir dalam kes ini berkenaan analisa?*

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J: *Saya yang menginterpretasi data dan juga keputusan yang diperolehi dan saya juga yang membuat Laporan Kimia.* (Emphasis added.)

[36] On the totality of SP2's evidence, it is clear that SP2 was the one who conducted the affirmative test using GCMS. The trial judge had also found that she was a credible witness and had accepted her evidence. At para 9 of the grounds of judgment, the trial judge had this to say:

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9. Berdasarkan kepada alasan itu, saya menerima dan berpuashati dengan

A penjelasan oleh SP2 itu, maka saya membuat kesimpulan bahawa SP2 adalah saksi pakar yang kredible. Begitulah juga dengan method yang beliau ambil di dalam menganalisa dadah tersebut. Saya terima sebagai keterangan yang kredibel. Saya juga tidak meragui berat bersih yang ditemui oleh beliau itu. Maka elemen ini telah dibuktikan oleh pihak pendakwa.

B [37] On the same issue, we also found that there was no material contradiction in the evidence of SP2. Contradiction if any, had been explained by SP2 in her re-examination as alluded to earlier. As to the issue of contradiction of witness's evidence, it is instructive to make reference to the
C Federal Court case of *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said this:

D ... In my opinion, discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and does not remember accurately every single thing that happened...*The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good reasons, to accept part of the testimony of a witness and to reject the other.* (Emphasis added.)
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[38] Coming back to the instant case, as mentioned earlier that there was no material contradiction in the evidence of SP2 and her evidence, including the affirmative test using GCMS was correctly accepted by the trial judge.
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[39] In addition, it is also trite law that the evidence of a chemist should be accepted 'on its face value' without going into details of what the chemist did in the laboratory, step by step unless the evidence is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the chemist's evidence (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC), *Public Prosecutor v Lam San* [1991] 3 MLJ 426).
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[40] In the instant case, SP2's evidence was not inherently incredible as she was merely conducting the tests to determine whether the substances were dangerous drugs in accordance with the established methods and there was no other expert was called to contradict her result of the analysis. Thus, her evidence on the analysis of the drugs was correctly accepted in this case.
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I APPRECIATION OF THE DEFENCE'S CASE

[41] Lastly, it was the appellant's contention that the trial judge had erred in failing to appreciate the appellant's defence and submitted that when there were two versions in a case, the version of the appellant should be accepted.

[42] In evaluating the defence's case, the trial judge has to determine whether the evidence adduced had rebutted the presumptions if any, on the balance of probabilities and further, whether the defence had raised a reasonable doubt on the prosecution's case.

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[43] In *Mohamed Yatin bin Abu Bakar v Public Prosecutor* [1950] MLJ 57 at p 59, on evaluation of the defence evidence, the court held as follows:

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... In this country, at the close of the case for the prosecution the court will not call upon the accused for his defence unless the evidence of the prosecution witnesses is, in the first instance, believed. *If, when called upon for his defence the accused gives evidence, then the question is, not which story is to be believed, but whether, even if the court is not inclined to accept all that the accused has said, his evidence does not raise a reasonable doubt as to the truth of the prosecution evidence or as to the accused guilt.* (Emphasis added.)

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[44] Further, a credible defence is a defence that answers the evidence of the prosecution and whether the defence has raised a reasonable doubt on the prosecution's case is a question of fact to be determined by the trial judge (see *Azhar bin Lazim v Public Prosecutor* [2012] 5 MLJ 1; [2012] LNS 262 (COA)).

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[45] Reverting to the present case, we find, the trial judge had analysed the defence's case sufficiently as reflected in the grounds of judgment from paras 23 until 40 and found that the appellant had failed to rebut the relevant presumption and had also failed to raise a reasonable doubt on the prosecution's case.

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[46] Next, we also find that the doctrine of 'wilful blindness' is applicable in the present case against the appellant. The appellant had ample opportunity to check the contents of the box but failed to do so. The fact and circumstances in which the appellant was asked to deliver the box to 'Mike' had raised suspicion which the appellant ought to enquire further as to the truth of what was informed to him by Frank. Firstly, the appellant only knew Frank for about a month to trust him that the box contained chocolates and did not enquire further. He was given USD500 and his travel expenses to Malaysia was paid for just to enquire for a job from Mike and to deliver the chocolates to him. Here, his failure to enquire further with regard to the contents of the box raised a reasonable inference that he knew the box contained dangerous drugs and he was guilty of wilful blindness.

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[47] The doctrine of wilful blindness had also been succinctly explained by the Federal Court in *Public Prosecutor v Herlina Purnama Sari* [2017] 1 MLRA 499 which merits reproduction:

- A [45] Wilful blindness necessary entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further enquiries in order to avoid confirming what the actual situation is, then such decision not to make further enquiries in order to avoid confirming what the actual situation is, then such a
- B decision is necessarily a deliberate one. *The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and coupled with) a deliberate decision not to make further investigation.* Whether the doctrine of wilful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the trial judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of witnesses (see *Public Prosecutor v Tan Kok An* [1995] 4 MLRH 256).
- C

- [46] ... The doctrine of 'wilful blindness' can be summarized to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, *if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he failed to embark upon this course of action, then he will be guilty of 'wilful blindness'.* In other words, he is taken to know the true situation. He then cannot be said to have either to have either rebutted the presumption of knowledge or to have raised a reasonable doubt as to his knowledge of the situation. (Emphasis added.)
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- [48] Further, in re-examination of the appellant, he testified that he came to Malaysia not to work in Malaysia but to discuss with 'Mike' about Mike's business and his opportunity to work in South Africa. This is reflected in the notes of proceedings as follows:
- F

- Q: You said you come to Malaysia to talk to Mike and you agree with my learned friend you are more convenient to work in South Africa. During examination-in-chief without your statement you said Mike is going to open a shop in South Africa. My question is you going to work in Malaysia or South Africa?
- G

- A: *Work in South Africa.*
- H

- Q: *What is the purpose you come to Malaysia?*

- A: *To talk to Mike and he will explain to me what is business is about and what he wants to do and how we should do and then we can open the business in South Africa.* (Emphasis added.)
- H

- [49] In this regard, as the appellant's intention was to work in South Africa, there was no reason for him to come to Malaysia to meet Mike and incurred expenses just to talk about Mike's business and the possibility for Mike to open a shop in South Africa. Moreover, the appellant was not offered as a partner in the business for him to travel all the way to Malaysia to discuss about the said business. The discussion to get the job if any, can always be made over the phone. A reasonable conclusion here is that the appellant came to Malaysia not for any business but to traffic the impugned drugs. In addition, if it is true that
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Mike has three electronic wholesale shops in Malaysia, the appellant or Frank could easily give to the police, the address of the shops and more importantly, Mike's full name and particulars for further investigation and confirmation. However, this was not done.

[50] In the circumstances, we find, the trial judge was correct in rejecting the defence's version and concluded that the defence had failed to rebut the presumption under s 37(d) and failed to raise a reasonable doubt on the prosecution's case.

CONCLUSION

[51] Based on the aforesaid reasons, we find that there is no appealable error by the trial judge that warrant our intervention. The conviction against the appellant is safe. As such, the appellant's appeal against the conviction and sentence is dismissed and the decision of the High Court is affirmed.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh

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